

Memorandum

TO: Anatomical Gift Drafting Committee

FROM: Sheldon F. Kurtz

DATE: November 10, 2004

RE: Possible Topics (Section references are to the 87 Act).

Section 1: Definitions:

1. Add definition of “designated requestor” (Per request of AOPO) (Would conform to Medicare Conditions of Participation for Hospitals Act, 42 CFR 482.45 incorporating rules that define the qualifications of persons who may request organs from a family).

2. Amend definition of “document of gift” to take account of creation of a donor registry. (Per request of AOPO and Eye Bank) (Necessary should the committee adopt the suggestion for the creation of a donor registry) (See also AMA letter 2/17/04).

3. Amend definition of “enucleator” to insert “qualified and trained.” (Per request of AOPO)(reflects fact that such persons are trained to perform tasks but are not licensed).

4. Amend definition of “technician” to insert “qualified and trained.” (Per request of AOPO and Eye Bank)(reflects fact that such persons are trained to perform tasks but are not licensed). Eye Bank would add “licensed or certified and would expand on who can qualify and train.

5. Add definition of a “state donor registry.” (Per request of Eye Bank)

Section 2: Making, Amending, Revoking, and Refusing to Make Anatomical Gifts by Individual

1. Amend Subsection (b) to permit the making of an anatomical gift by e-sign. (Per request of AOPO).

2. Amend Section 2 to permit an agent of an individual acting under the durable health care power to make a cadaveric gift on behalf of the principal. (Per suggestion of reporter). Expand this as well to allow such gifts by parent or guardian.

3. Amend Subsection (a) to require the individual to be competent but perhaps separate out the refusal to make a gift so that even individuals who are not competent can refuse to make a gift. (Per suggestion of reporter).

4. Amend subsection (f)(2) to delete a revocation by oral statement to two witnesses. (Per request of AOPO)

5. Amend subsection (f)(2) to allow revocation by removal of the donor's name from donor registry. (Per request of AOPO)

6. Amend subsection (f)(3) to require other forms of communicated revocation by terminally ill individuals to be witnessed. (Per request of AOPO).

7. Subsection (h) provides that a donor's anatomical gift is irrevocable. Should this section be strengthened to alter the language providing "and does not require the consent or concurrence of any person after the donor's death" to "and cannot be revoked by any person after the donor's death." (Per suggestion of reporter).

8. Subsection 7 was apparently intended to provide that the revocation of an anatomical gift by a donor does not limit the ability of the donor or others to make an anatomical gift at a future time barring an express indication to the contrary. If this was the intent, should this section be redrafted to be clearer?

Section 3: Making, Revoking, and Objecting to Anatomical Gifts, By Others

1. Amend section to allow gifts by agents acting under a durable health care power even though principal has died. (Per suggestion of reporter).

2. Amend section to allow gifts by personal representative named in a donor's will, a public health official, or by a domestic or same-sex partner.

3. Add to the list of others: "any other person authorized or under obligation to dispose of the decedent's body." (Per suggestions of AOPO and Eye Bank).

4. Amend subsection (b)(1) to give meaning to the word "available" and to clarify when another person may make a donation. (Per suggestion of AOPO).

5. Delete subsection (b)(3) which would prohibit a person with a lower priority from making an anatomical gift if he/she knew of an objection by a person with a higher priority. (Per suggestion of AOPO). See also Ring memo of 11/18/03

Section 4. Authorization by [Coroner]

1. Two important cases:

State v. Powell, 497 So.2d 1188 (Fl. 1986)

Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991).

2. Amend section to “encourage prompt and effective action by” coroner. (Per Ring memo of 11/18/03)

3. Amend to include provision to assure organs are not unnecessarily withheld by a coroner modeled on a Texas statute. (Per request of ACOT)

Section 5, Routine Inquiry and Required Request, Search and Notification

This section may need much revision in light of the adoption of 42 CFR 482.45 and other regulations applicable to OPO requesting organs. Some suggested language has been made AOPO to replace subsections (a) and (b).

Section 6. Persons Who May Become Donees; Purposes for which Anatomical Gifts May be Made.

1. Amend subsection (a)(1) to permit a designated organ or other procurement organization to be the recipient of an anatomical gift with a corresponding amendment in subsection (b). (Per request of AOPO).

Section 7. Delivery of Document of Gift

Section 8 Rights and Duties at Death.

1. Delete the last sentence providing “after removal of the part, custody of the remainder of the body vests in the person under obligation to dispose of the body.” (Per request of AOPO).

Section 9. Coordination of Procurement and Use.

1. Eye Bank, I believe, wants language amended to assure that the cooperation that occurs is among hospitals, organ procurement organizations, eye banks, and tissue banks.

Section 10. Sale or Purchase of Parts Prohibited.

See No. 5 under Other.

Section 11. Examination, Autopsy, Liability

1. Amend subsection (a) to allow OPO's etc. to obtain information about a donor's suitability as a donor of organs at, or near the time of the donor's death. (Per request of AOPO).

2. Amend to allow testing. (Per request of Eye Bank).

Other:

1. Develop a concept of "informed consent" per suggestion of eye bank. Eye bank has suggested language for a definition. See also Idaho which has a detailed statute on what information must be provided to a family member of a person who died without having made an anatomical gift to obtain that family member's consent.

2. Expand to deal with obligations of emergency personnel.

3. Presumed Consent (Study committee caution)

4. Mandated Choice (See AMA letter 2/17/04).

5. Incentive payments (Study Committee caution). Note: Committee might want to eliminate section 10 of the existing law prohibiting sales to the effect that if federal law changes there would be no conflict with state law.

(See AMA letter 2/17/04)

6. Living donors (including directed donations).

7. A broadened immunity from liability section including a section to immunize OPO, funeral directors, tissue banks etc. from liability for removing organs donated by a donor even where there has been post-mortem family objection. (From Reporter. See also AMA letter 2/17/04).

8. Expand role of physicians as requestor. (AMA letter of 2/17/04).

9. Non-heart beating donors (Study Committee caution) (AMA letter 2/17/04 seeks some legal support).

10. Directed donation (described by characteristics as distinguished from designation of a specific person), e.g., woman, African-American.

11. Add same-sex or domestic partner to list of potential agents for donor.

12. Provision extending reciprocity to out-of-state organ cards.

13. Uniform Donation Card.

14. Some states have statutes requiring local use of organs before allowing organ to leave state. This affects Status 1 liver patients. Is it a good idea?